

LEWIS BRISBOIS BISGAARD & SMITH LLP

GEORGE J. ZISER, SB# 51879

E-mail: Ziser@lbbslaw.com

JONATHAN RIZZARDI, SB# 244784

E-mail: Rizzardi@lbbslaw.com

One Sansome Street, Suite 1400

San Francisco, California 94104

Telephone: (415) 362-2580

Facsimile: (415) 434-0882

Attorneys for Defendants

VITAMIN SHOPPE INDUSTRIES INC. and NUTRITION NOW, INC.

**ORIGINAL
FILED**

E-filing

MAR 31 2008

**RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JOHN MARCOVICH,

Plaintiff,

v.

**VITAMIN SHOPPE INDUSTRIES INC.;
NUTRITION NOW, INC.; and DOES 1 TO
100,**

Defendants.

CV 08 CASE NO.

1736

**NOTICE OF REMOVAL OF ACTION
PURSUANT TO 28 U.S.C. §1441(b)
(DIVERSITY)**

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

**PLEASE TAKE NOTICE THAT Defendants VITAMIN SHOPPE INDUSTRIES INC. and
NUTRITION NOW, INC. ("defendants"), by and through their undersigned attorneys of record,
hereby remove to this Court the state court action described below.**

JURISDICTION AND VENUE

**1. This Court has subject matter jurisdiction of this action under 28 U.S.C. §1332, and
this action may be removed to this Court by defendants pursuant to the provisions of 28 U.S.C.
§1441(b), in that this is a civil action between citizens of different states, and the amount in
controversy as alleged in the complaint exceeds the sum of \$75,000, exclusive of interest and
costs.**

2. Venue is proper in the Northern District of California, San Francisco Division, pursuant to 28 U.S.C. §1441(a) because this action was originally brought in San Francisco County Superior Court.

GROUND FOR REMOVAL

3. On January 31, 2008, plaintiff John Marcovich ("plaintiff"), by and through his attorneys, filed a civil action in the Superior Court of the State of California for the County of San Francisco against VITAMIN SHOPPE INDUSTRIES INC. and NUTRITION NOW, INC, entitled *John Marcovich v. Vitamin Shoppe Industries Inc., Nutrition Now, Inc. And Does 1 to 100*, San Francisco Superior Court, Case No. CGC-08-471667. A true and correct copy of the complaint is attached hereto as **Exhibit A**.

4. On March 3, 2008, the complaint was served on defendant NUTRITION NOW, INC. at its headquarters in Vancouver, Washington. On March 6, 2008, the complaint was served on defendant VITAMIN SHOPPE INDUSTRIES INC. Thus, this notice of removal is within the thirty (30) day time limit for removal set forth in 28 U.S.C. §1446(b).

5. The basis for removal is that this Court has original jurisdiction of this action under 28 U.S.C. §1332 because plaintiff is a citizen of the State of California and VITAMIN SHOPPE INDUSTRIES INC. and NUTRITION NOW, INC. are citizens of other states. VITAMIN SHOPPE INDUSTRIES INC. is a corporation organized and existing under the laws of the State of New York. VITAMIN SHOPPE INDUSTRIES INC. maintains its principal place of business in the State of New Jersey, where all of its officers have their offices and where all strategic decisions are made. VITAMIN SHOPPE INDUSTRIES INC. has retail stores in 33 states and the District of Columbia, and also makes substantial sales nationally over the internet and through its catalog. NUTRITION NOW, INC. is a corporation organized and existing under the laws of the State of Delaware. NUTRITION NOW, INC. maintains its principal place of business in the State of Washington, where all of its officers have their offices and where all strategic decisions are made. NUTRITION NOW, INC. further maintains the majority of its tangible property and production activities in the State of Washington. NUTRITION NOW, INC. distributes its

1 products globally, but does not engage in the sale of products directly to consumers. As a result of
2 the above, there is complete diversity of citizenship under 28 U.S.C. §1332.

3 6. Plaintiff's complaint indicates that this is an unlimited civil case and alleges that he
4 is entitled to judgment in an undetermined amount but including compensation for wage loss,
5 hospital and medical expenses, general damage and loss of earning capacity arising out of an
6 alleged serious personal injury. With the complaint, plaintiff's counsel served a written settlement
7 demand, a true and correct copy of which is attached hereto as **Exhibit B**, for \$1,000,000,
8 including "nearly one hundred thousand dollars in medical bills" and "tremendous loss in wages."
9 Thus, the amount in controversy substantially exceeds \$75,000, as required for removal pursuant
10 to 28 U.S.C. §1332.

11 7. Because both NUTRITION NOW, INC. and VITAMIN SHOPPE INDUSTRIES
12 INC. are represented by the same counsel, all defendants join in this notice of removal and no
13 additional consent is required.

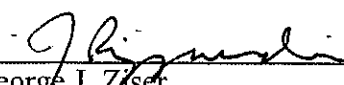
14 8. Written notice of the filing of this Notice of Removal will be given to plaintiff
15 as required by 28 U.S.C. § 1446(d) and to the Superior Court in which this action was originally
16 filed.

17 9. Defendants reserve the right to arbitrate the claims asserted in this action pursuant
18 to an agreement to arbitrate between plaintiff and VITAMIN SHOPPE INDUSTRIES INC. and to
19 stay this action pending completion of arbitration.

20
21
22 DATED: March 31, 2008

LEWIS BRISBOIS BISGAARD & SMITH LLP

23
24
25 By


George J. Ziser

Jonathan Rizzardi

Attorneys for Defendants

VITAMIN SHOPPE INDUSTRIES INC. and
NUTRITION NOW, INC.

FEDERAL COURT PROOF OF SERVICE

Marcovich v. Vitamin Shoppe Industries, Inc., et al. - File No. CGC-08-471667

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to the action. My business address is One Sansome Street, Suite 1400, San Francisco, California 94104. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On March 31, 2008, I served the following document(s):

NOTICE OF REMOVAL OF ACTION PURSUANT TO 28 U.S.C. §1441(b) (DIVERSITY)

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

Counsel for Plaintiff JOHN MARCOVICH

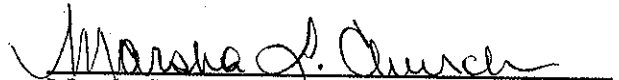
Michael T. Morrissey, Esq.
Robert A. Machado, Esq.
1110 North First Street
San Jose, CA 95112
T: (408) 280-7011; F: (408) 741-1671
E: morrisseylaw02@aol.com

The documents were served by the following means:

☒ (BY U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and I deposited the sealed envelope or package with the U.S. Postal Service, with the postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 31, 2008, at San Francisco, California.


Marsha L. Church

LEWIS BRISBOIS BISGAARD & SMITH LLP

ONE SANSOME STREET, SUITE 1400
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 362-2580

EXHIBIT A

Jan 31 2008 1:36PM

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P. 2

SUMMONS (CITACION JUDICIAL)

NOTICE TO DEFENDANT:

(AVISO AL DEMANDADO):

VITAMINE SHOPPE INDUSTRIES, INC.; NUTRITION NOW, INC.;
and DOES 1 to 100

YOU ARE BEING SUED BY PLAINTIFF:

(LO ESTÁ DEMANDANDO EL DEMANDANTE):

JOHN MARCO VICH

SUM-100

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form. If you want the court to hear your case, there may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito debe ser en un formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de costas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte lo podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados local.

The name and address of the court is:

(El nombre y dirección de la corte es):

SAN FRANCISCO COUNTY SUPERIOR COURT - Civil Division
400 McAllister Street, San Francisco, CA, CA 94102CASE NUMBER:
(Número del caso):

JAN 31 2008

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Michael T. Morrissey (Bar # 062195)

Phone No.: (408) 280-7011

Robert A. Machado, State Bar # 088836

GORDON PARK-LI CRISTINA E. HERNANDEZ (408) 741-1671

1110 North First Street, San Jose, CA 95112

DATE:

Clerk, by _____

Deputy

(Fecha)

JAN 31 2008

(Secretario)

(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

BY FAX

(SEAL)

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☐ on behalf of (specify):

- under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.80 (authorized person)

☐ other (specify):

4. ☐ by personal delivery on (date):

Page 1 of 1

Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 (Rev. January 1, 2004)

SUMMONS

LexisNexis® Automated California Judicial Council Forms

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ENDORSED PLD-PI-001 San Francisco County Superior Court JAN 31 2008 ROSEBON PARKER, Clerk CHRISTINE E. MALLOTT, Deputy Clerk	
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number and address): Michael T. Morrissey (State Bar # 062195) Robert A. Machado, State Bar # 088836 1110 North First Street San Jose, CA 95112 TELEPHONE NO: (408) 280-7011 FAX NO. (Optional): (408) 741-1671 EMAIL ADDRESS (Optional): morrisseylaw02@aol.com ATTORNEY FOR (Name): JOHN MARCOVICH, Plaintiff	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO STREET ADDRESS: 400 McAllister Street MAILING ADDRESS: CITY AND ZIP CODE: San Francisco, CA 94102 BRANCH NAME: Civil Division	
PLAINTIFF: JOHN MARCOVICH DEFENDANT: VITAMINE SHOPPE INDUSTRIES, INC.; NUTRITION NOW, INC.; And <input checked="" type="checkbox"/> DOES 1 TO 100	
COMPLAINT—Personal Injury, Property Damage, Wrongful Death <input type="checkbox"/> AMENDED (Number): Type (check all that apply): <input type="checkbox"/> MOTOR VEHICLE <input checked="" type="checkbox"/> OTHER (specify): <input type="checkbox"/> Property Damage <input type="checkbox"/> Wrongful Death <input checked="" type="checkbox"/> Personal Injury <input checked="" type="checkbox"/> Other Damages (specify): Negligence	
Jurisdiction (check all that apply): <input type="checkbox"/> ACTION IS A LIMITED CIVIL CASE Amount demanded <input type="checkbox"/> does not exceed \$10,000 <input type="checkbox"/> exceeds \$10,000, but does not exceed \$25,000 <input checked="" type="checkbox"/> ACTION IS AN UNLIMITED CIVIL CASE (exceeds \$25,000) <input type="checkbox"/> ACTION IS RECLASSIFIED by this amended complaint <input type="checkbox"/> from limited to unlimited <input type="checkbox"/> from unlimited to limited	
CASE NUMBER: JAN 31 2008 CASE MANAGEMENT CONFERENCE SET JUL 3 2008 - 9:00 AM DEPARTMENT 212	

1. Plaintiff (name or names): JOHN MARCOVICH
 alleges causes of action against defendant (name or names): VITAMINE SHOPPE INDUSTRIES, INC. and
 NUTRITION NOW, INC.
2. This pleading, including attachments and exhibits, consists of the following number of pages: 5
3. Each plaintiff named above is a competent adult
- a. ☐ except plaintiff (name):
- (1) ☐ a corporation qualified to do business in California
 - (2) ☐ an unincorporated entity (describe):
 - (3) ☐ a public entity (describe):
 - (4) ☐ a minor ☐ an adult
 - (a) ☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
 - (b) ☐ other (specify):
 - (5) ☐ other (specify):
- b. ☐ except plaintiff (name):
- (1) ☐ a corporation qualified to do business in California
 - (2) ☐ an unincorporated entity (describe):
 - (3) ☐ a public entity (describe):
 - (4) ☐ a minor ☐ an adult
 - (a) ☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
 - (b) ☐ other (specify):
 - (5) ☐ other (specify):

☐ Information about additional plaintiffs who are not competent adults is shown in Attachment 3.

 Form Approved for Optional Use
 Judicial Council of California
 PLD-PI-001 (Rev. January 1, 2007)

 COMPLAINT—Personal Injury, Property
 Damage, Wrongful Death

 Page 1 of 3
 Code of Civil Procedure, § 426.12
 www.courtinfo.ca.gov

LexisNexis® Automated California Judicial Council Forms

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PLD-PI-001

SHORT TITLE:

MARCOVICH v. VITAMINE SHOPPE INDUSTRIES, et al.

CASE NUMBER:

4. ☐ Plaintiff (name):

is doing business under the fictitious name (specify):

and has complied with the fictitious business name laws.

5. Each defendant named above is a natural person

a. ☒ except defendant (name): VITAMINE SHOPPE c. ☐ except defendant (name):(1) ☒ a business organization, form unknown(2) ☐ a corporation(3) ☐ an unincorporated entity (describe):(4) ☐ a public entity (describe):(5) ☐ other (specify):(1) ☐ a business organization, form unknown(2) ☐ a corporation(3) ☐ an unincorporated entity (describe):(4) ☐ a public entity (describe):(5) ☐ other (specify):b. ☒ except defendant (name): NUTRITION NOW, INC. d. ☐ except defendant (name):(1) ☒ a business organization, form unknown(2) ☐ a corporation(3) ☐ an unincorporated entity (describe):(4) ☐ a public entity (describe):(5) ☐ other (specify):(1) ☐ a business organization, form unknown(2) ☐ a corporation(3) ☐ an unincorporated entity (describe):(4) ☐ a public entity (describe):(5) ☐ other (specify):☐ Information about additional defendants who are not natural persons is contained in Attachment 5.

6. The true names of defendants sued as Does are unknown to plaintiff.

a. ☒ Doe defendants (specify Doe numbers): 1-50 were the agents or employees of other named defendants and acted within the scope of that agency or employment.b. ☒ Doe defendants (specify Doe numbers): 51-100 are persons whose capacities are unknown to plaintiff.7. ☐ Defendants who are joined under Code of Civil Procedure section 382 are (names):

8. This court is the proper court because

a. ☐ at least one defendant now resides in its jurisdictional area.b. ☐ the principal place of business of a defendant corporation or unincorporated association is in its jurisdictional area.c. ☒ injury to person or damage to personal property occurred in its jurisdictional area.d. ☐ other (specify):9. ☐ Plaintiff is required to comply with a claims statute, anda. ☐ has complied with applicable claims statutes, orb. ☐ is excused from complying because (specify):

PLD-PI-001


SHORT TITLE: MARCOVICH V. VITAMINE SHOPPE INDUSTRIES, et al.	CASE NUMBER:
--	--------------

10. The following causes of action are attached and the statements above apply to each (each complaint must have one or more causes of action attached):
- ☐ Motor Vehicle
 - ☒ General Negligence
 - ☐ Intentional Tort
 - ☒ Products Liability
 - ☐ Premises Liability
 - ☐ Other (specify):
11. Plaintiff has suffered
- ☒ wage loss
 - ☐ loss of use of property
 - ☒ hospital and medical expenses
 - ☒ general damage
 - ☐ property damage
 - ☒ loss of earning capacity
 - ☐ other damage (specify):
12. ☐ The damages claimed for wrongful death and the relationships of plaintiff to the deceased are
- ☐ listed in Attachment 12.
 - ☐ as follows:
13. The relief sought in this complaint is within the jurisdiction of this court.
14. Plaintiff prays for judgment for costs of suit; for such relief as is fair, just, and equitable; and for
- (1) ☒ compensatory damages
 - (2) ☐ punitive damages
- The amount of damages is (in cases for personal injury or wrongful death, you must check (1)):
- (1) ☒ according to proof
 - (2) ☐ in the amount of: \$
15. ☐ The paragraphs of this complaint alleged on information and belief are as follows (specify paragraph numbers):

Date: January 25, 2008

Michael T. Morrissey

(TYPE OR PRINT NAME)

► 

(SIGNATURE OF PLAINTIFF OR ATTORNEY)

PLD-PI-001(2)

SHORT TITLE:

MARCOVICH v. VITAMINE SHOPPE INDUSTRIES, et al.

CASE NUMBER:

FIRST
(number)**CAUSE OF ACTION—General Negligence**

Page 4

ATTACHMENT TO ☒ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

GN-1. Plaintiff (name): JOHN MARCOVICH

alleges that defendant (name): VITAMINE SHOPPE INDUSTRIES, INC. and NUTRITION NOW, INC.

☒ Does 1 to 100

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant negligently caused the damage to plaintiff

on (date): July 15, 2006

at (place): Unknown

(description of reasons for liability):

The defendants, and each of them, manufacture and distribute a product designed for human consumption and fail to warn that its use could lead to the contraction of a dangerous bacteria. They each fail to take the necessary precautions to ensure their product is safe.

Page 1 of 1

PLD-PI-001(5)

SHORT TITLE:

MARCOVICH v. VITAMINE SHOPPE INDUSTRIES, et al.

CASE NUMBER:

SECOND

CAUSE OF ACTION—Products Liability

Page 5

(number)

ATTACHMENT TO ☒ Complaint ☐ Cross - Complaint
 (Use a separate cause of action form for each cause of action.)

Plaintiff (name):

Prod. L-1. On or about (date): July 15, 2006
 PB-8

plaintiff was injured by the following product:

Prod. L-2. Each of the defendants knew the product would be purchased and used without inspection for defects.
 The product was defective when it left the control of each defendant. The product at the time of injury was being

☒ used in the manner intended by the defendants.

☐ used in the manner that was reasonably foreseeable by defendants as involving a substantial danger not readily apparent. Adequate warnings of the danger were not given.

Prod. L-3. Plaintiff was a

☒ purchaser of the product.

☒ user of the product.

☐ bystander to the use of the product.

☐ other (specify):

PLAINTIFF'S INJURY WAS THE LEGAL (PROXIMATE) RESULT OF THE FOLLOWING:

Prod. L-4. ☒ Count One—Strict liability of the following defendants who

a. ☒ manufactured or assembled the product (names): VITAMINE SHOPPE INDUSTRIES, INC. and NUTRITION NOW, INC.

☒ Does 1 to 20

b. ☐ designed and manufactured component parts supplied to the manufacturer (names):

☐ Does _____ to _____

c. ☒ sold the product to the public (names): VITAMINE SHOPPE INDUSTRIES, INC. and NUTRITION NOW, INC.

☒ Does 21 to 40

Prod. L-5. ☒ Count Two—Negligence of the following defendants who owed a duty to plaintiff (names): VITAMINE SHOPPE INDUSTRIES, INC. and NUTRITION NOW, INC.

☒ Does 41 to 60

Prod. L-6. ☒ Count Three—Breach of warranty by the following defendants (names): VITAMINE SHOPPE INDUSTRIES, INC. and NUTRITION NOW, INC.

☒ Does 61 to 80

a. ☒ who breached an implied warranty

b. ☐ who breached an express warranty which was
☐ written ☐ oral

Prod. L-7. ☒ The defendants who are liable to plaintiffs for other reasons and the reasons for the liability are

☐ listed in Attachment-Prod. L-7 ☒ as follows: VITAMINE SHOPPE INDUSTRIES, NUTRITION NOW and Does 1-100 failed to warn the consumer that the product used could cause severe injury due to the contraction of a harmful bacteria.

Page 1 of 1

EXHIBIT B

MICHAEL T. MORRISSEY
LAW OFFICES OF MICHAEL T. MORRISSEY

1110 NORTH FIRST STREET

SAN JOSE, CA 95112

(408) 280-7011

(408) 741-1671 - Facsimile

March 3, 2008

Vitamine Shoppe Industries, Inc.
C/O CSC Lawyers Incorporating Service
Sacramento CA95852-6036

Vitamine Shoppe Industries, Inc.
2101 91st
North Bengen NJ07047

Nutrition Now
Attn: Legal
6350 NE Campos DR
Vancouver, WA 98661

Re: Marcovich v. Vitamine Shoppe Industries, Inc./
Nutrition Now, Inc.

Gentlepeople, as you know I am representing John Marcovich in his claim for damages against your organizations arising out of his illness caused by your product known as PB-8. The problem is that when you manufacture these products without pasteurization you run the risk of spreading dangerous bacteria such as in Mr. Marcovich's case.

I will be amending the complaint in order to maintain a class action pursuant to the consumers legal remedies act and Business and Professions code §17200 as soon as the thirty days run from the service of this notice. This letter is to advise you of your violation of subsections 5 and 7 of Civil code section 1770 (C.C. § 1770 (5), (7) verbatim copy enclosed).

The way to fix the problem is easy. You need to change all advertizing to reflect the benefits of your bacteria weighed against the risk of serious illness or death if the bad stuff makes it into the manufacturing process or product. You should also devise some sort of testing mechanism to ensure that you are only distributing the good stuff uncontaminated with the bad.

Finally on an individual level you need to compensate Mr. Marcovich in the amount of one million dollars for his injury which includes the nearly one hundred thousand dollars in medical bills he has incurred and the tremendous loss in wages he has suffered. In short the one million would be in full settlement of his personal injury claim including medicals- past, present and future, wage loss- past, present and future, disability and pain and suffering.

Very truly yours,


Michael T. Morrissey